



STATE MINING & GEOLOGY BOARD
DEPARTMENT OF CONSERVATION
STATE OF CALIFORNIA



SURFACE MINING AND RECLAMATION ACT

FINANCIAL ASSURANCE GUIDELINES

Sections 2770 and 2773.1 of the Surface Mining and Reclamation Act of 1975 (SMARA, Public Resources Code Section 2710 et seq.) require surface mining operators to obtain lead agency (city, county, or State Mining and Geology Board (SMGB)) approved financial assurances for reclamation. SMARA was amended in 1992 by the enactment of AB 3098 (Sher, Chapter 1077, Statutes of 1992) which required the SMGB to adopt financial assurance guidelines by March 1, 1993, to implement SMARA Section 2773.1 and to assist mining operators and lead agencies in complying with the Act's financial assurance requirements. The Guidelines serve to clarify and supplement existing statute. They do not create new requirements for mining operators or local lead agencies. By statute, the Guidelines are exempt from the requirements of Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code, and are not subject to review by the Office of Administrative Law. The Guidelines are reviewed, revised and re-adopted as necessary. Should SMARA be amended, statute will supersede this document.

(1) WHY ARE FINANCIAL ASSURANCES REQUIRED?

The State Legislature amended the Surface Mining and Reclamation Act (SMARA, Public Resources Code Section 2710 et seq.) to require surface mining operators to obtain lead agency (city, county, SMGB) approved financial assurances for the reclamation of mined lands, and surrounding lands affected by mining activities, so that the public will not bear the cost of reclaiming an abandoned surface mine site. In the event of such abandonment or financial incapability by the operator, the financial assurance funds will be used by the lead agency or the Department of Conservation (Department) to reclaim both the mined lands and those surrounding affected lands.

The term "mined lands", when used in the context of SMARA, refers to all lands disturbed by the mining process.

Reference: SMARA Sections 2729, 2733, 2770 (a), and 2773.1

(2) WHAT IS THE PURPOSE OF FINANCIAL ASSURANCES?

Financial assurances serve as an assurance that lands affected by a surface mining operation will be reclaimed in accordance with the requirements of its lead agency approved reclamation plan.

Reference: SMARA Section 2773.1(a).

(3) WHAT DO FINANCIAL ASSURANCES GUARANTEE?

Financial assurances guarantee that funds will be available to the lead agency and to the Department to reclaim mined lands, and surrounding lands affected by mining activities, in accordance with the approved reclamation plan, including: (1) areas disturbed after January 1, 1976; (2) areas scheduled for disturbance in the next year; and (3) areas not successfully reclaimed pursuant to the lead agency approved reclamation plan, if the mine operator is not able to perform the reclamation.

Reference: SMARA Sections 2770(d); 2773.1(a); and 2776

(4) WHAT IS THE LEAD AGENCY'S REVIEW PROCESS FOR FINANCIAL ASSURANCES?

The lead agency should develop a time schedule for the review and approval of the financial assurance and provide it to the mine operator upon submittal by the operator of the proposed financial assurance cost estimate calculation. The schedule should indicate: (1) the amount of time the lead agency and the Department have to review and comment on the proposed financial assurance calculation and amount; and, (2) when the operator can expect to receive final approval or denial of the proposed financial assurance amount. Upon final action, the lead agency should provide to the mine operator written notice of the following: (1) approval of the financial assurance mechanism and the amount; or, (2) denial of the financial assurance mechanism or amount, for what reasons, and a course of action available to the mine operator as well as the consequences of not providing an adequate and acceptable financial assurance.

Reference: SMARA Section 2770(d)

(5) WHAT HAPPENS IF MY FINANCIAL ASSURANCES ARE NOT APPROVED BY THE LEAD AGENCY?

If an operator's proposed financial assurances are not approved by the lead agency, the operator should carefully examine the reasons provided by the lead agency for the denial of the financial assurances. If the operator believes that the financial assurances have not been approved because of lead agency inaction, or were denied for reasons not related to the requirements in SMARA or the SMGB's Regulations, then the operator may appeal the lead agency's inaction or denial of financial assurances to the SMGB within 15 days of exhausting his or her rights to appeal according to the procedures of the lead agency. The SMGB may either accept or decline to hear the appeal based on the evidence supplied by the appellant in the request. The SMGB may approve a financial amount after a public review and hearing, which is binding on both the operator and the lead agency.

Reference SMARA Section 2770(e)(f)(g)

(6) DOES THE DEPARTMENT REVIEW FINANCIAL ASSURANCES AND WHAT IS THE DEPARTMENT'S REVIEW PROCESS?

SMARA provides that the lead agency annually approve all financial assurances, and any amendments thereto; however, the Department is provided the opportunity to review all financial assurances, and any amendments, 45 days prior to lead agency approval. The Department review period shall start upon the Department's receipt of the proposed financial assurance, and end 45 calendar days after receipt. The financial assurance should be forwarded to the Department for review after review and preliminary approval of the assurance. The Department will review the proposed financial assurance for its consistency with the requirements provided in SMARA Sections 2770 and 2773.1.

If the Department finds the financial assurance to be inconsistent with statutory requirements, written comments specifying the deficiency(ies), and if appropriate, suggested corrections, will be forwarded to the lead agency for consideration. If the lead agency's position is at variance with the Department's recommendations and conclusions regarding the financial assurance, or any amendments thereto, the lead agency must submit to the Department a statement of findings specifying the reasons for its position. Any amendments or changes to an existing financial assurance must be submitted to the Department for review prior to lead agency approval of the changes.

Reference: SMARA Sections 2774(c)-(d)

(7) WHAT IS AN ADEQUATE AMOUNT FOR A FINANCIAL ASSURANCE?

The amount of the financial assurance must be sufficient to ensure that the lead agency or the Department can reclaim (as described in SMARA Section 2733), pursuant to the approved reclamation plan, the mined lands (as defined in SMARA Section 2729) subject to the assurance described above.

Reference: SMARA Section 2773.1(a)

(8) HOW SHOULD THE AMOUNT OF THE FINANCIAL ASSURANCE BE CALCULATED?

The SMGB recognizes that the amount of financial assurance is based on the size, complexity, environmental setting, and type of operation described in the approved reclamation plan. The amount of financial assurance must be calculated on a site specific basis that reflects the elements in the related site specific reclamation plan.

The amount of the financial assurance is to be calculated by the mine operator, a licensed engineer, or other professionals experienced in the reclamation of mined lands, and based on: (1) an analysis of the physical activities necessary to implement the approved reclamation plan; (2) the lead agency's (or a third party contract) unit costs for each of the described physical activities; (3) the number of units required to perform each of the activities; (4) an amount to cover contingency costs, (not to exceed 10% of the above calculated reclamation cost) and, (5) actual lead agency administrative costs.

The calculated amount does not include the cost of completing the mining of the site.

The value of mined material stockpiles located on the mine plant site cannot be used to off-set the cost of reclaiming the mine plant site or any other part of the mined lands subject to the reclamation plan.

The estimate used in determining the calculated cost to reclaim the physical plant site, e. g. dismantling and removing the equipment, structures, and related facilities, may be net of the surplus/salvage value of the structures, equipment, and facilities to be dismantled and removed. Any calculated surplus/salvage value cannot be applied to offset any other costs of reclamation of the mined lands.

Documentation of the calculation must be made available for lead agency and Department review. Comments on acceptable procedures for the calculation of the amount of financial assurances are presented in Appendices A and A-1. Third party estimates, bids, or cost calculations from a company or contractor for performing reclamation of the physical plant, or for establishing the surplus/salvage value for the plant structures, equipment and related facilities to be removed, should contain the following information:

- a. name & location of company or contractor
- b. statement of qualifications and experience
- c. location of mine site & California Mine ID #
- d. description of work to be done
- e. net cost of such work
- f. dates that third party estimates, bid, or cost calculations are in effect
- g. signature of responsible party, and seal/stamp of licensed professional as required in law

Third party estimates of the surplus/salvage value of the plant structures, equipment and related facilities to be reclaimed also may be based upon bids or quotes from companies in the business of buying scrap metals or similar products.

In the event that the approved reclamation plan lacks specific details for implementation, the unit activities necessary to reclaim the mined site should be detailed in a manner that provides for the approved end use, and the unit costs and number of units should be calculated. Documentation of the calculation must be made available for lead agency and Department review.

Reference: SMARA Section 2773.1(a)

(9) WHAT IS THE DIFFERENCE BETWEEN A "FINANCIAL ASSURANCE" AND A "FINANCIAL ASSURANCE MECHANISM"?

A "financial assurance" is an amount of money, or a guarantee of an amount of money, that is set aside to ensure that funds will be available to complete reclamation on mined lands pursuant to the approved reclamation plan. A "financial assurance mechanism" is the instrument that serves as the financial assurance, such as a surety bond, trust fund or irrevocable letter of credit.

Reference: SMARA Sections 2770(a); and 2773.1(a)(1)

(10) WHAT TYPES OF FINANCIAL ASSURANCE MECHANISMS ARE ACCEPTABLE?

1. **Surety Bonds.** A surety bond is an indemnity agreement in an amount certain executed by an admitted surety insurer as defined in subdivision (a) of Section 995.120 of the Code of Civil Procedure. Surety bonds must meet the applicable requirements of the California Code of Civil Procedures, Part 2, Title 14, commencing with section 995.010 (see Appendix B).

Surety bonds are issued for a specific period of time and cannot be cancelable by the mining operator until new financial assurances are approved by the lead agency, following a Department review. In addition, bonds must include a clause requiring the notice of cancellation to the lead agency and the Department a minimum of 120 days prior to any such cancellation to ensure the mining operator provides sufficient notice to fulfill the requirements of SMARA Section 2773.1(b).

2. **Trust Funds.** Trust funds are cash or cash certain financial instruments put up by the mine operator. They may take the form of:
 - a. a cash account deposited in one or more federally insured accounts;
 - b. negotiable bonds, "held in escrow", of the United States, a state, county, or municipality, endorsed by the mine operator, and rated "A" or better by a nationally recognized bond rating organization ("zero-coupon bonds" including "savings bonds" and some types of coupon municipal bonds may be used at their current market value as determined annually, but may not be used at their value at maturity before maturity occurs);
 - c. negotiable certificates of deposit in one or more federally insured depositories.

The lead agency, the Department and the bank holding the funds should maintain a record of the lead agency approved trust fund. Cash accounts and certificates of deposit must not exceed the applicable FDIC, FSLIC or insured account limits. Interest earned is not part of the financial assurance and should be payable to the mining operator at his or her discretion.

3. **Irrevocable Letters of Credit.** A letter of credit is a letter from any bank authorized to do business in the State of California granting credit on behalf of the mine operator. Letters of credit should be for a specific period of time and must not be revocable by the mining operator until reclamation is completed pursuant to the approved reclamation plan and the lead agency, the Department, and any other beneficiaries issue a notice of release to the operator, or the letter of credit is replaced with another acceptable financial assurance mechanism.

4. **Other financial assurance mechanisms specified by the SMGB.** In addition to the mechanisms described in subsections 1, 2, and 3 above, state, county, city, district, or other political subdivisions may use the following mechanisms for surface mines owned and operated by state and local government entities:

(a) Pledge of Revenue – This is a resolution by a political subdivision to commit an established and secure revenue source that it controls, such as fees, rents, or tax revenues, which will be available in a timely manner to conduct and complete reclamation; and,

(b) Budget Set Aside – This is a line item budget amount or specific fund that is committed by a political subdivision for the conduct and completion of reclamation.

A Pledge of Revenue and a Budget Set Aside are mechanisms that are not available to private mine operators; therefore, pledges of revenue streams such as “tipping fees” or percentages of future profits, and proposed budget set asides such as special funds or deposits, cannot be used.

Regulations adopted by the SMGB specifying alternative mechanisms shall be implemented by these *Guidelines*.

Reference: SMARA Section 2773.1(a)(1)

(11) WHO SELECTS THE FINANCIAL ASSURANCE MECHANISM?

The choice of the type of financial assurance mechanism is that of the mine operator so long as the lead agency determines the financial assurance amount is adequate to perform reclamation in accordance with the approved reclamation plan. The mining operator may exchange one acceptable financial assurance mechanism with another acceptable mechanism of equivalent coverage so long as there is no lapse in coverage and the new financial assurance is approved by the lead agency following Department review.

Reference: SMARA Sections 2773.1(a)(1)-(4)

(12) TO WHOM MUST THE FINANCIAL ASSURANCE MECHANISM BE MADE PAYABLE?

The financial assurance must be made payable to the Lead Agency and the Department of Conservation. The financial assurance may also be made payable to additional public agencies, including federal agencies responsible for enforcing reclamation requirements over the mining operation. (See Appendix C for examples of the appropriate wording.) The financial assurance mechanism shall not be made payable to or assigned to the surface mining operator. The operator shall not be named as a beneficiary on the financial assurance.

Reference: SMARA Section 2773.1(a)(4)

(13) WHAT FORMAT SHOULD BE USED FOR THE FINANCIAL ASSURANCE MECHANISM?

Examples of acceptable formats for Irrevocable Letter of Credit and Certificate of Deposit financial assurances are presented in Appendices D and F. The lead agency may accept these or other equivalent formats. Surety Bonds must be in a format approved by the Attorney General. Surety Bond forms in Appendices E-1, E-2, E-3, E-4, and E-5 have been approved by the Attorney General.

(14) WHAT IS THE PERIOD OF LIABILITY FOR THE OPERATOR?

The mine operator is responsible for maintenance of financial assurances continuously throughout the life of the mining operation, (including idle periods and extended monitoring periods), until the reclamation is completed pursuant to the approved reclamation plan and verified by the lead agency and the Department, and the lead agency, the Department, and any other beneficiary agencies have approved the release of the financial assurances. The financial assurance mechanism need not be for the life of the mine, so long as a sequence of mechanisms is maintained which provide continuous coverage without lapse.

Reference: SMARA Sections 2770(h); 2773.1(a); and 2773.1(a)(2)

(15) WHAT TERM IS ACCEPTABLE FOR THE FINANCIAL ASSURANCE MECHANISM?

The financial assurance mechanism can be for the life of the mine or a lesser period of at least one year. The mechanism must remain in effect for the specified term of coverage plus an additional 120 days, during which time the lead agency can take the necessary steps to collect the financial assurance. The additional period of 120 days is not needed if a subsequent mechanism has been offered to and approved by the lead agency. Proof of a new, renewed or existing financial assurance in an adequate amount must be provided annually to the lead agency and the Department pursuant to Public Resources Code Section 2207. Proof of the new or renewed financial assurance mechanism must be submitted prior to the existing financial assurance mechanism's expiration date to prevent a lapse in coverage.

Reference: SMARA Section 2773.1(a)(2); and Public Resources Code Section 2207(a)(9)

(16) WHEN SHOULD THE AMOUNT OF THE FINANCIAL ASSURANCE BE ADJUSTED?

The amount of the financial assurance must be reviewed annually by the lead agency and, if necessary adjusted to reflect changes in: (1) the cost of reclamation (as reflected in the Construction Cost Index or other generally used index), pursuant to the approved reclamation plan, of land disturbed since January 1, 1976; (2) land reclaimed in the previous year to the satisfaction of the lead agency; (3) new land disturbed both vertically and horizontally, and (4) land to be disturbed in the next year. In addition, when an approved reclamation plan is amended, and the amendment is approved by the lead agency, following Department review, financial assurances must be adjusted accordingly.

Reference: SMARA Section 2773.1(a)(3)

(17) WHEN SHOULD FINANCIAL ASSURANCES FOR A NEW SURFACE MINING OPERATION BE PROVIDED?

The financial assurance must be approved by the lead agency, following Department review, prior to the start of any mining activities. The financial assurance should be submitted after lead agency approval of the reclamation plan. Financial assurances for new surface mining operations must be calculated, reviewed, and approved in the same manner as financial assurances for existing mining operations. The mine operator should offer to the lead agency a financial assurance for its approval and the Department must have the opportunity to review the financial assurance at least 45 days prior to such approval. The financial assurance must provide for the performance of the approved reclamation plan and include costs for the reclamation of land that will be disturbed in the next year.

Reference: SMARA Section 2770(a)

(18) ARE FINANCIAL ASSURANCES REQUIRED FOR "IDLE" MINES?

Financial assurances are required for idle mines in an amount sufficient to reclaim, pursuant to the lead agency approved reclamation plan, land disturbed since January 1, 1976, land to be disturbed in the next year, and land not reclaimed successfully pursuant to the approved reclamation plan. Financial assurances for idle mines must be calculated, reviewed and approved in the same manner as financial assurances for active mining operations. *Reference: SMARA Sections 2727.1 and 2770(h)(2)*

(19) WHAT MUST BE DONE WITH THE FINANCIAL ASSURANCE WHEN A MINING OPERATION IS SOLD OR OPERATORSHIP OTHERWISE IS TRANSFERRED?

When a mining operation is sold, or operatorship otherwise is transferred, the original operator's financial assurance must remain in effect until the lead agency has approved, following Department review, the replacement assurances provided by the successor operator. The prior operator's financial assurance should be released only upon the approval by the lead agency of the replacement financial assurance. A replacement financial assurance must be approved in the same manner as the existing financial assurance.

Reference: SMARA Section 2773.1(c)

(20) WHEN SHOULD A FINANCIAL ASSURANCE BE RELEASED?

When the operator has completed reclamation, the operator should request a written notice from the lead agency that reclamation has been completed pursuant to the approved reclamation plan. Within 60 days of the lead agency's receipt of such a request, the lead agency should determine if reclamation has been completed pursuant to the approved reclamation plan. Prior to making this determination, the lead agency should conduct an inspection of the mining operations and, if necessary, a review of pertinent records, and otherwise satisfy itself that reclamation of the site has been completed, that any required extended monitoring periods have expired, and that reclamation performance standards as specified in the approved reclamation plan have been met.

Upon determining that reclamation successfully has been completed and prior to releasing the financial assurances, the lead agency shall inform the Department of its

determination and receive the written concurrence of the Department that no reclamation liabilities remain, and that reclamation has been completed in accordance with the approved reclamation plan. Following receipt by the lead agency of the Department's concurrence, the lead agency must notify the operator and any other beneficiaries to the financial assurances that reclamation has been successfully completed and specify the date the financial assurances are proposed to be released.

If the lead agency determines that reclamation has not been completed successfully, it should provide the operator with written notification of its determination along with a list of the specific actions required to successfully complete reclamation pursuant to the approved reclamation plan in order to obtain release of the financial assurance.

Reference: SMARA Section 2773.1(c)

APPENDIXES